

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 March 2004

CASE NO.: 2003-BLA-5885

In the Matter of:

HOWARD DANIEL
Claimant

v.

U. S. STEEL MINING COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

APPEARANCES:

Patrick. K. Nakamura, Esq.
For the Claimant

James N. Nolan, Esq.
For the Employer

Before: DANIEL L. LELAND
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Birmingham, AL on January 13, 2004 at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. At the hearing, Director's exhibits (DX) 1-20 and claimant's exhibits (CX) 1-2 were admitted into evidence. Claimant and employer filed post-hearing briefs.

ISSUES

- I. Existence of pneumoconiosis
- II. Causal relationship of pneumoconiosis and coal mine employment.
- II. Existence of total disability.
- IV. Causation of total disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ¹

Procedural History

Howard Daniel (claimant or miner) filed a claim for black lung benefits on April 11, 2002. (DX 2) The claim was administratively denied on April 3, 2003 and claimant requested a hearing. (DX 16, DX 17) The case was referred to the Office of Administrative Law Judges on May 13, 2003. (DX 20)

Background

Claimant was born on August 25, 1925 and has one dependent for purposes of augmentation: his wife, Barbara. (DX 2) He was employed as a coal miner for U. S. Steel Mining Company from April 1965 to August 1997. (DX 3, DX 5, DX 6, TR 9) He worked fifteen years in the underground mines and eighteen years in the preparation plant. (TR 9) His last job was a coal sampler in the preparation plant which had six floors. (TR 18, 21, 22) Claimant is short of breath when walking and uses inhalers to help his breathing. (TR 26, 27) He stopped smoking cigarettes thirty years ago. (TR 28)

Medical Evidence

Chest x-rays

<u>Exhibit</u>	<u>Date</u>	<u>Physician</u>	<u>Interpretation</u>
DX 8	6/20/02	Hasson, B	no evidence of pneumoconiosis
DX 8	6/20/02	Goldstein, BCR, B	quality 3
CX 1	6/20/02	Cappiello, BCR, B	1/1, p/q

¹ The following abbreviations have been used in this opinion: DX=Director's exhibit, CX=claimant's exhibit, TR=transcript of hearing, BCR=board certified radiologist, B=B reader.

CX 2	8/29/02	Martin	no acute chest disease
CX 2	3/3/0/03	Karcher	negative chest

CT chest scans of September 3 and December 18, 2002 showed a small nodule in the right middle lobe. (CX 2)

Pulmonary Function Studies

<u>Exhibit</u>	<u>Date</u>	<u>Height</u>	<u>Age</u>	<u>FEV1</u>	<u>FVC</u>	<u>MVV</u>
CX 2	11/29/01	72 in.	66	1.06	1.94	----
DX 8	6/20/02	71 in.	66	1.86	2.83	62
DX 8	8/28/02	71 in.	67	1.31	1.84	48

Dr. J. Michos found that the MVV performance on the June 20, 2002 studies was suboptimal but he found the August 28, 2002 studies to be acceptable. (DX 8)

Blood Gas Studies

<u>Exhibit</u>	<u>Date</u>	<u>PCO2</u>	<u>PO2</u>
DX 8	6/20/02	43.4	85.5

Medical Reports

Claimant was examined by Dr. Jack Hasson on June 20, 2002. (DX 8) Dr. Hasson recorded a cigarette smoking history of one pack a day from 1954 to the 1970s. In the physical examination, he noted expiratory wheezes bilaterally. The chest x-ray was negative for pneumoconiosis, the pulmonary function studies showed mild obstruction, and the blood gas test was normal. Dr. Hasson found no evidence of pneumoconiosis, COPD from cigarette smoking, and a history of congestive heart failure. He stated that claimant has a mild pulmonary impairment.

Records of claimant's treatment at HealthSouth Metro West Hospital are in CX 2. In a December 12, 2001 report, Dr. Gaines F. Jones noted that recent chest x-rays did not show any acute changes and that recent pulmonary function studies demonstrated a severe obstructive ventilatory impairment. Examination of the chest revealed interstitial rales but no wheezes or rhonchi. Dr. Jones' impressions were chronic obstructive pulmonary disease with recent exacerbation, probably some mild degree of pneumoconiosis either related to coal workers' pneumoconiosis or asbestosis, hypertension, morbid obesity, and probable sleep apnea. Dr. Jones also evaluated the miner on March 14, April 30, August 29, September 3, and December 17, 2002, and March 29, 2003. In his most recent report of March 29, 2003, Dr. Jones noted that claimant had worked in the coal mines for thirty three years and had smoked cigarettes for twenty years quitting thirty years before. He referred to abnormal pulmonary function studies performed two years ago. In the examination he observed diffuse wheezes over both lung fields. Dr. Jones' impressions were chronic obstructive pulmonary disease exacerbation, obstructive sleep apnea, hypertensive vascular disease, pneumoconiosis, degenerative joint disease, and obesity.

Conclusions of Law

Benefits are provided to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. § 718.204(a). Claimant has the burden of proving by a preponderance of the evidence that he has pneumoconiosis arising out of coal mine employment and that he is totally disabled as a result. *Gee v. W. G. Moore & Sons, Inc.*, 9 BLR 1-4 (1986). A finding of the existence of pneumoconiosis may be made based on chest x-rays, autopsies or biopsies, the presumptions in §§ 718.304, 718.305, or 718.306, and the reasoned medical opinion of a physician that the miner has pneumoconiosis as defined in § 718.201.² § 718.202(a)(1)-(4). All types of relevant evidence must be weighed to determine if the miner has pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F. 3d 22 (3d Cir.1997) , *Island Creek Coal Co. v. Compton*, 211 F 3d 203 (4th Cir., 2000).

There are two x-ray readings for the presence of pneumoconiosis: Dr. Hasson and Dr. Cappiello's readings of the June 20, 2002 x-ray. Dr. Hasson interpreted the chest x-ray as negative for pneumoconiosis and Dr. Cappiello interpreted the x-ray as positive for pneumoconiosis. Dr. Hasson is a B reader, but Dr. Cappiello is both a board certified radiologist and a B reader and therefore his opinion is entitled to greater weight. See *Cranor v. Peabody Coal Co*, 22 BLR 1-1 (1999) (en banc on recon.) I therefore find that a preponderance of the x-ray evidence is positive for pneumoconiosis.

There is no biopsy evidence and claimant is not entitled to the enumerated presumptions.

Dr. Hasson stated that claimant does not have pneumoconiosis but he based his finding on his own negative chest x-ray interpretation which is outweighed by Dr. Cappeillo's positive chest x-ray interpretation. I give his opinion little weight. Dr. Jones diagnosed pneumoconiosis in his most recent report in which he took into account claimant's thirty three years of coal mine employment and his remote cigarette smoking history. I find his opinion to be well reasoned. Based on all the evidence, I find that claimant has pneumoconiosis.

Claimant is entitled to the presumption in § 718/203(b) that his pneumoconiosis arose out of his coal mine employment. There is no evidence of record demonstrating that claimant's pneumoconiosis had any source other than his coal mine work, and therefore the presumption has not been rebutted.

A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If that presumption does not apply, a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. § 718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability shall be established by pulmonary function studies showing the values equal to or less than those in Appendix B, blood gas studies showing the values in Appendix C, the existence of cor pulmonale with right sided congestive heart failure, or the reasoned and documented opinion of a physician finding that the miner's pulmonary or

² Pneumoconiosis is defined as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment, and it includes both medical, or clinical, pneumoconiosis and statutory, or legal pneumoconiosis.

respiratory impairment prevents him from engaging in his usual coal mine work and comparable and gainful work § 718.204(b)(2).

All three pulmonary function studies have produced qualifying values which are well below the predicted levels. The lone blood gas test is nonqualifying and there is no evidence that the miner has cor pulmonale. Dr. Hasson determined that claimant has a mild pulmonary impairment but he based his conclusion on the results of the June 20, 2002 pulmonary function studies, although the results of the pulmonary function studies of November 29, 2001 and August 28, 2002 had considerably lower values. Upon reviewing the August 28, 2002 studies, Dr. Hasson stated they show a severe restrictive ventilatory impairment coexisting with small airways obstructive disease and that the MVV is severely reduced. Clearly his finding of a mild pulmonary impairment can not be credited. Dr. Jones did not assess the degree of claimant's pulmonary impairment. Based on my review of all the evidence, I find that the evidence establishes that claimant is totally disabled.

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's total disability if it: (i) Has a material adverse effect on his respiratory or pulmonary impairment; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. § 718.204(c)(1).

Dr. Hasson attributed the miner's pulmonary impairment to cigarette smoking, but such a finding is questionable in light of claimant having quit smoking thirty years ago. Moreover, as Dr. Hasson did not diagnose pneumoconiosis or find total disability, his opinion on etiology is entitled to little weight. *See Scott v. Mason Coal Co.*, 289 F. 3d 263 (4th Cir. 2002). Although Dr. Jones did not specifically attribute the miner's pulmonary impairment to pneumoconiosis, he diagnosed pneumoconiosis and clearly believed that it had a significant affect on claimant's pulmonary condition. I therefore conclude that pneumoconiosis is a substantially contributing cause of claimant's totally disabling pulmonary impairment.

The evidence establishes all the elements of entitlement. As the evidence does not clearly establish an onset date of total disability due to pneumoconiosis, benefits will be awarded as of April 1, 2002, the first day of the month in which the claim was filed. § 725.503(b). Claimant's counsel has thirty days to file a fully supported fee application and his attention is directed to §§ 725.365 and 725.366. The employer has twenty days to respond with objections.

ORDER

IT IS ORDERED THAT U. S. Steel Mining Company:

- (1) Pay to claimant all the benefits to which he is entitled, augmented by one dependent, beginning as of April 1, 2002; and
- (2) Pay to claimant all the medical benefits to which he is entitled beginning as of April 1, 2002.

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DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this Decision and Order was filed in the office of the district director, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210